



The Freedom of Information Act and Confidentiality of Cultural Resources



SYNOPSIS

Cultural resource professionals and information managers may find that their responsibilities appear to conflict with the Freedom of Information Act (FOIA) when they receive requests for materials protected under different statutory authorities. FOIA, passed in 1966 to ensure public access to U.S. government records, may, for example, appear to conflict with laws that protect cultural resources by restricting dissemination of certain information about them. This Brief provides a guide to navigating requests for information about cultural resources and harmonizing the various applicable statutes.

Within the Department of Energy (DOE), the Office of Environmental Policy and Assistance, within the Office of Health, Safety and Security, is responsible for providing information and developing guidance on compliance with cultural resource laws. This information brief describes the various legal requirements that DOE staff members should consider when responding to FOIA requests that include information protected under cultural resource protection laws.

If you have additional questions after receiving a FOIA request for information about cultural resources, please feel free to contact Beverly Whitehead at 202 586-6073, the FOIA Office, or the Office of General Counsel.

INTRODUCTION

Cultural resources include, but are not limited to, a range of items and locations (DOE Guidance Memorandum, February 23, 1990), including the following:

- archeological materials (i.e., artifacts) and sites dating to the prehistoric, historic, and

ethnohistoric periods that are located on the ground surface or are buried beneath it;

- standing structures that are over 50 years of age or are important because they represent a major historical theme or era;
- cultural and natural places, select natural resources, and sacred objects that have importance for Native Americans and ethnic groups; and
- American folk-life traditions and arts.

DOE is required to protect cultural resources that are found on the property it manages or controls. Protection is more stringent for those resources that are listed on or eligible for listing on the National Register of Historic Places (the National Register). DOE must also consider the impacts of its "undertakings" on cultural resources wherever they are found, even if not on DOE managed or controlled land. The National Historic Preservation Act (NHPA) defines an undertaking as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of [DOE], including those carried out by or on behalf of [DOE]; those carried out with [DOE] financial assistance; and those requiring a [DOE] permit, license, or approval."

In the process of complying with requirements regarding cultural resources under the NHPA or the National Environmental Policy Act (NEPA), sensitive information about these resources may become part of DOE's official records. Such details may be withheld from the public to protect the cultural resources, by, for example, withholding location information to prevent looting and desecration.

The importance of restricting confidential information is emphasized throughout DOE Guide 450.1-3, *Environmental Guidelines for Development of Cultural Resource Management Plans—Update*. For example, sections 3.3 and 3.4 state the following:

The Archeological Resources Protection Act (ARPA) precludes public access to maps or other information concerning the nature and location of cultural resources under the Freedom of Information Act...or under any other provision of law unless certain conditions specified in the Act are met. Sections of the [Cultural Resource Management Plans] that contain maps or other information of this type should be considered sensitive, and distribution should be restricted appropriately.

FREEDOM OF INFORMATION ACT

FOIA carries a presumption of disclosure; the burden is on the government—not the public—to substantiate why information may not be released. Thus, a written request under FOIA requires DOE, as a federal agency, to release its records or explain why they cannot be released. FOIA lists, in Section 552(b), nine specific exemptions that allow agencies to withhold either certain information contained in records or entire records from public disclosure. One of the FOIA exemptions allows an agency to withhold records “specifically exempted from disclosure by statute.” This exemption includes two qualifications: the statute must “(A) [require] that the matters be withheld from the public in such a manner as to leave no discretion on the issue or (B) [establish] particular criteria for withholding or [refer] to particular types of matters to be withheld.” This exemption includes cultural resource information (e.g., electronic and hardcopy inventory and evaluation records, maps, raw data, reports) that is exempt from disclosure under the cultural resource statutes discussed below. According to its 2007 Annual Report on the administration of FOIA, DOE has used this exemption to withhold cultural resource information.

CULTURAL RESOURCE STATUTES

NHPA and ARPA specifically restrict disclosure of certain types of sensitive information regarding cultural resources. These statutory provisions may result in information developed under these acts being withheld from public disclosure under the FOIA exemption discussed above.

National Historic Preservation Act

NHPA is the principal federal law dealing with historic preservation. As defined in Section 301(5) of the Act, “historic property” or “historic resource” means “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource.”

Section 304 of the NHPA protects some information about historic resources from public disclosure. Specifically, it requires federal agencies, such as DOE, to “withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the agency and the Secretary of the Interior agree that disclosure may (1) cause a significant invasion of privacy, (2) risk harm to the historic resource, or (3) impede the use of a traditional religious site by practitioners.” For purposes of this section of NHPA the Secretary of the Interior acts through the director of the National Park Service (NPS). DOE, therefore, consults with the NPS to make a determination to withhold information from the public.

Once a determination to withhold information from the public has been made, the NPS, in consultation with DOE, will determine who (if anyone) may have access to the information for NHPA purposes. If the information was developed in order to comply with NHPA Section 106 or Section 110(f), the NPS must consult with the Advisory Council on Historic Preservation (the Advisory Council) in making the determinations regarding withholding the information from the public and restricting access to the site.

NHPA Section 106 requires DOE to “take into account” the effect of its “undertakings” on historical and archaeological resources and to give the Advisory Council the opportunity to comment on such effects. Section 110(f) of NHPA requires DOE to give the Advisory Council the opportunity to comment specifically on undertakings that may directly and adversely affect any National Historic Landmark and, to the maximum extent possible, to complete such planning and actions as may be necessary to minimize harm to them before approving any such undertaking.

Archaeological Resources Protection Act

ARPA provides a comprehensive framework to protect and regulate archaeological resources on federal and Indian lands. It also provides for issuance of permits for excavation and removal of resources and provides confidentiality of resource locations. ARPA defines archeological resource as “[a]ny material remains of past human life or activities which are of archaeological interest, . . . [including], but not . . . limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items.” Items must be at least 100-years old to be considered as archeological resources. A more detailed definition of archeological resource is provided in the uniform regulations implementing ARPA, 43 Code of Federal Regulations (CFR) part 7, Protection of Archaeological Resources, subsection 7.3.

Section 9 of ARPA specifically prohibits the release of “information concerning the nature and location of archaeological resources for which the excavation or removal requires a permit or other permission under this Act” unless the DOE land manager determines that releasing the information furthers the purposes of ARPA and will not create a risk of harm to the resources. Section 9(b) of ARPA does, however, provide for sharing such information with state governors upon written request, if they guarantee to protect its confidentiality in order to guard the resources from commercial exploitation. Because ARPA only applies on public or Indian lands, it does not protect information from archaeological sites on private or non-federal public lands.

NATIONAL ENVIRONMENTAL POLICY ACT

NEPA provides for public participation in federal agency decisionmaking. Section 102 of NEPA requires agencies to prepare detailed, publicly available statements concerning the environmental impact of any major federal action that may significantly affect the quality of the human environment. The Council on Environmental Policy (CEQ) has issued implementing regulations (40 CFR parts 1500-1508) stating that “NEPA procedures must insure that environmental information is available to

public officials and citizens before decisions are made and before actions are taken.” Those regulations specifically state in 40 CFR 1506.6(f) that agencies shall “make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act . . .” DOE’s NEPA regulations (10 CFR part 1021.301) also provide for public review of NEPA documents.

CEQ’s regulations encourage agencies to “prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by . . . the National Historic Preservation Act of 1966 . . . and other environmental review laws and executive orders.” DOE’s NEPA regulations include similar requirements. This integration can result in information about cultural resources being included in DOE’s NEPA documents.

There are, however, exceptions to the general public disclosure of information in NEPA documents. DOE’s NEPA regulations in 10 CFR 1021.340, “Classified, confidential, and otherwise exempt information,” state that, “(a) Notwithstanding other sections of this part, DOE shall not disclose classified, confidential, or other information that DOE otherwise would not disclose pursuant to . . . FOIA....” The regulations go on to state in subpart (b), “To the fullest extent possible, DOE shall segregate any information that is exempt from disclosure requirements into an appendix to allow public review of the remainder of a NEPA document.”

Thus, while compliance with NEPA requires public disclosure of most information, DOE’s implementing regulations reiterate that otherwise exempt information should not be released. Confidential information about cultural resources protected under NHPA or ARPA would fall into this category and may, thus, be exempt from release under the FOIA.

GUIDANCE FROM THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

The Advisory Council is an independent federal agency that promotes the preservation, enhancement, and productive use of our nation’s historic resources. The Advisory Council has prepared guidance to help federal agencies comply with NHPA Section 106

(www.achp.gov/archguide). The guidance outlines several issues to consider about the use of Section 304 of NHPA to restrict disclosure of information (<http://www.achp.gov/archguide/comment/reply/91>):

- Not all records, field notes, or data analyses are subject to withholding under Section 304 of the NHPA. Only information about a property's "location, character, or ownership" is protected.
- Only information about a historic resource, as defined in Section 301(5) of NHPA, may be kept confidential under Section 304; that is, the information must be about a property that is listed on, or eligible for listing on, the National Register (36 CFR 60.4). Information about a historical site that is not listed on, or is not eligible for listing on, the National Register may not be withheld from disclosure under Section 304.
- To withhold information, DOE and NPS must make a determination that its release may result in one of the following: cause a "significant" invasion of privacy, risk harm to the historic resource, or impede use of a traditional religious site by practitioners.

Thus, information (including electronic or hard copy records, notes, or analyses, or parts thereof) is not protected under NHPA Section 304 if it does not meet these standards regarding type of information; historic property status; and risk of invasion of privacy, harm, or impediment to use. Restriction of information under ARPA is limited to sites on federal or Indian land; it does not apply to private or non-federal public land.

Indian tribes sometimes provide written information about a sensitive site to DOE to ensure that it is considered in a NHPA Section 106 review. If DOE determines that the site is not listed on or eligible for listing on the National Register, the written information collected about the site, including its location and sensitivity, would not be protected under Section 304 and could be disclosed in response to a FOIA request.

RECOMMENDATIONS

DOE sites or offices should consider the following issues when receiving a FOIA request that asks for information

about a cultural resource.

- Does the FOIA request ask for information about a historic property or historic resource? If so, is the site eligible for or listed on the National Register? If it is, information about it is protected under NHPA and could be exempt from disclosure under a FOIA request, as discussed above, if DOE and NPS agree that it should not be released.
- Does the FOIA request ask for information about an archaeological resource for which the excavation or removal requires a permit or other permission under ARPA (i.e., is it more than 100-years old)? If so, is the excavation site on DOE or Indian land? If it is, information about it is protected under ARPA and, thus, falls under the third exemption from disclosure under a FOIA request.

Note that not all information about a cultural resource needs to be kept confidential. Alternative means of presenting cultural resources and information to the public for both educational and tourism purposes may be desirable, while still protecting them by, for example, not identifying their exact location. Such alternatives may include offsite videos, web sites, interactive interpretation and exhibits, and "virtual" tours. Presentations such as these can foster broad understanding, support appreciation of historic and archaeological resources, and foster a greater knowledge and understanding of the American past (ACHP Policy Statement: Archaeology, Heritage Tourism, and Education). Public awareness and appreciation of the value of cultural resources and their contribution to our knowledge about both past and living cultures is an important goal consistent with NHPA and other national heritage policies.

FOR FURTHER ASSISTANCE

Several DOE offices can provide assistance in responding to a FOIA request that asks for information on historic properties or cultural resources.

- The Office of Environmental Policy and Assistance (HS-22) establishes requirements and expectations to safeguard the environment from the hazards associated with DOE

operations. The Office also assists field elements in implementing environmental policies and resolving environmental protection issues, including the management and protection of cultural resources. It strives to utilize input from all sources in tailoring policies and providing assistance to help DOE achieve its environmental mission.

- The headquarters Office of the General Counsel (GC) and Field Office Counsels are responsible for providing legal advice, counsel, and support to all DOE elements. They also assure that DOE operates in compliance with all pertinent laws and regulations, including FOIA and cultural resource laws. The Office of NEPA Policy and Compliance (GC-20) can also provide assistance related to disclosure of information in NEPA documents.
- The Freedom of Information Act and Privacy Act Office, within the Office of Information Resources (MA-90) in the Office of Management (MA) is responsible for administering policies, programs, and procedures to ensure DOE compliance with FOIA. Each DOE location has a designated FOIA officer who reports through the headquarters FOIA officer to the Chief DOE FOIA officer. The local FOIA officer can assist DOE staff in determining whether a FOIA request meets the requirements for withholding information under any of the cultural resource laws or NEPA.

REFERENCES

Statutes:

Archeological Resources Protection Act (ARPA), 16 U.S.C. 470 *aa-mm*

Freedom of Information Act (FOIA), 5 U.S.C. 552

National Environmental Policy Act (NEPA), 42 U.S.C. 4321

National Historic Preservation Act (NHPA), 16 U.S.C. 470 *et seq.*

Executive Orders:

Executive Order 13287. *Preserve America*. March 3, 2003.

Regulations:

Department of Energy National Environmental Policy Act Implementing Procedures (10 CFR part 1021)

National Register of Historic Places (36 CFR part 60)

Determination of Eligibility for Inclusion in the National Register of Historic Places (36 CFR part 63)

Protection of Historic Properties (36 CFR part 800)

Council on Environmental Quality Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR parts 1500–1508)

Protection of Archaeological Resources (The following regulations are identical: 43 CFR part 7, Department of the Interior; 18 CFR part 1312, Tennessee Valley Authority; 32 CFR part 229, Department of Defense; and 36 CFR part 196, Department of Agriculture)

Department of Energy Documents:

Office of Environmental Guidance (EH-231)¹

Memorandum. *Management of Cultural Resources at Department of Energy Facilities*. February 23, 1990.

Office of Environment, Safety and Health.² *Department of Energy Management of Cultural Resources*. DOE P 141.1. May 2, 2001.

——— *Environmental Guidelines for Development of Cultural Resource Management Plans—Update*. DOE G 450.1-3. September 22, 2004.

Office of Air, Water and Radiation Protection Policy and Guidance (EH-41)¹ Information Brief. *Archaeological Resources Protection Act*. EH-232-0004/0193r. Revised February 2006.

——— Information Brief. *National Historic Preservation Act*. DOE/EH-412/0002r. Revised February 2006.

——— Information Brief. *Management of Cultural Resources at Department of Energy Facilities*. DOE/EH-412/0005r. Revised February 2006.

¹ Currently known as the Office of Environmental Policy and Assistance (HS-22)

² Currently known as the Office of Health, Safety and Security (HS)

FOIA and Privacy Act Office. *U.S. Department of Energy
2007 Annual Report on the Administration of the
Freedom of Information Act.* February 1, 2008.

Advisory Council Documents:

Advisory Council on Historic Preservation. ACHP Policy
Statement: *Archaeology, Heritage Tourism, and
Education.* August 15, 2008.

——— *Section 106 Archaeology Guidance: Questions
and Answers* (undated) (web based).

*The Office of Environmental Policy and Assistance establishes
environmental protection policies for DOE and assists DOE
elements in implementing them. It also helps resolve
compliance issues. Please refer any questions and requests
for assistance concerning the subject
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